

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**HALIMA SHEILR DAHIR**

Claimant

V.

**TYSON FRESH MEATS, INC.**

Self-Insured Respondent

Docket No. 1,061,273

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the November 13, 2014, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on March 20, 2015. Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Carolyn McCarthy of Kansas City, Missouri, appeared for self-insured respondent.

The ALJ found claimant sustained a 3 percent permanent partial impairment to the body as a whole as a result of an accidental injury arising out of and in the course of her employment with respondent on July 27, 2011. The ALJ determined claimant is entitled to unauthorized medical not to exceed \$500. The ALJ did not award future medical treatment.

The Board has considered the record and adopted the stipulations listed in the Award.<sup>1</sup>

**ISSUES**

Claimant argues she has proven a functional impairment of 23 percent to the body as a whole related to her injury of July 27, 2011. Claimant requests the right to review and modify, together with the right to future medical treatment.

Respondent maintains the ALJ's Award should be affirmed. Alternatively, respondent argues all compensation should be denied on the basis claimant failed to prove by a preponderance of credible evidence she suffered accidental injuries arising out of and

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<sup>1</sup> The stipulations include an agreement by the parties that the reports of Drs. Baughman, Murati, and Pratt could be admitted into the record without further foundation.

in the course of her employment with respondent. Respondent contends there is no evidence of a fall at work on July 27, 2011.

The issues for the Board's review are:

1. What is the nature and extent of claimant's disability?
2. Is claimant entitled to future medical treatment?
3. Is claimant entitled to unauthorized medical treatment?

#### **FINDINGS OF FACT**

Claimant testified she sustained three accidents in the course of her employment with respondent. Claimant testified about all three accidents during the regular hearing of August 4, 2014. Claimant required a Somali translator.

Only claimant's July 27, 2011, accident is the subject of Docket No. 1,061,273. Claimant testified a bone fell onto her head and left shoulder on July 27, 2011. Claimant described current, constant pain from the top of her head, around the left side of her head and down into her neck. Claimant stated the head pain causes her eyesight to become blurry. Claimant testified she had no pain in her head prior to the accident.

Claimant also described current, constant pain in both shoulders, with the majority of pain on the left side where she was struck by the falling bone. Claimant indicated the pain reaches to her left hand, and her shoulders occasionally pop while moving her arms.

Claimant was initially represented by the Mann Law Offices, LLC, who filed a claim on her behalf alleging an injury to the head on July 27, 2011, due to a fall at work. Claimant's current counsel filed an amended claim, indicating injuries to claimant's head, shoulder and neck as the result of a fall at work. Claimant stated when the bone fell on her head, she was struck unconscious and fell onto a table.

The ALJ noted in her Award:

The claimant's amended E-1 alleges she fell at work and sustained injury to her head, neck and left shoulder. She testified that she was hit with a bone and that she was knocked unconscious and fell on a table. From the histories in the medical records and the claimant's testimony, it is unclear exactly [what] happened and when but it is clear that the claimant relates all her conditions to her work activities.

The respondent stipulated that the claimant met with personal injury by accident arising out of and in the course of her employment on July 27<sup>th</sup>, 2013.<sup>2</sup>

Claimant was provided treatment by respondent. Claimant was given permanent restrictions on April 12, 2013, limiting her use of a knife, scissors, or hook. On April 12, 2013, Mitch Young, respondent's human resources manager, informed claimant her restrictions could not be accommodated. Claimant testified she was told by Mr. Young to stay home without pay until a position became available. Claimant stated Mr. Young informed her she had not been terminated.

Mr. Young testified respondent will find a light duty or restricted position for an employee with temporary restrictions until such time the employee either has permanent restrictions or recovers from his or her injuries. Mr. Young explained it is not respondent's practice to modify existing jobs for an employee with permanent restrictions. Instead, Mr. Young will assist an employee with permanent restrictions in finding an open position within the restrictions. Mr. Young stated an employee with permanent restrictions may check for bid jobs on a weekly basis. If a position within the restrictions becomes available, Mr. Young will assign the position. Mr. Young testified claimant was aware of respondent's policy, and it was her responsibility to apply for alternate positions with respondent.

A position fitting claimant's permanent restrictions eventually became available, and claimant returned to work for respondent on July 19, 2013. Claimant did not work during the period of April 12, 2013, through July 19, 2013, though she testified she continued to undergo medical treatment during this period. Claimant continues to work for respondent.

Dr. Michael J. Baughman provided an impairment rating on August 29, 2012. Dr. Baughman noted claimant had reached a static point in the orthopedic management of multiple musculoskeletal complaints, including her low back, right knee, and right shoulder. Dr. Baughman determined, using the *AMA Guides*,<sup>3</sup> that claimant has a zero percent impairment of the right shoulder based on a full range of motion and normal x-rays. Dr. Baughman did not address claimant's head, neck or left shoulder complaints.

Dr. Baughman assigned permanent restrictions and noted claimant's "condition is unlikely to improve or deteriorate in any predictable way with further time, prescription medication, supervised physical therapy or surgical intervention."<sup>4</sup> Claimant was released from Dr. Baughman's care.

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<sup>2</sup> ALJ Award (Nov. 13, 2014) at 5.

<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>4</sup> Baughman Report (Aug. 29, 2012) at 1.

On June 26, 2013, Dr. Pedro A. Murati examined claimant at claimant's counsel's request. Claimant complained to Dr. Murati of headaches with difficulty seeing; low back pain into both legs, worse on the right; pain in the bilateral shoulders going into the neck and upper back; pain in the bilateral elbows, hands, and all fingers; right knee and ankle pain; and difficulty sleeping due to all over body pain. After reviewing claimant's available history, medical records, and performing a physical examination, Dr. Murati listed the following impressions: bilateral carpal tunnel syndrome, left medial and lateral epicondylitis, myofascial pain syndrome of the bilateral shoulder girdles extending into the cervical and thoracic paraspinals, various lower extremity neuropathies, low back sprain, bilateral SI dysfunction, right medial collateral sprain with meniscal problems, right patellofemoral syndrome, right high ankle sprain, right plantar fasciitis, and metatarsalgia of the right second and third metatarsals.<sup>5</sup> Dr. Murati provided permanent restrictions and recommended claimant follow up with a physician on an annual basis. Dr. Murati noted claimant's diagnoses were within all reasonable medical probability a direct result from the work-related injuries sustained while working for respondent.

Using the *AMA Guides*, Dr. Murati opined claimant sustained a combined 23 percent impairment to the body as a whole related to the left upper extremity and the cervical and thoracolumbar areas. Dr. Murati wrote:

For the left carpal tunnel syndrome, using table 16, this claimant receives 10% left upper extremity impairment. For the moderate glenohumeral crepitus, using tables 18 and 19, this claimant receives 12% left upper extremity impairment. These impairments combine for a 21% left upper extremity impairment, which converts for 13% whole person impairment. . . . For the Myofascial pain syndrome affecting the cervical paraspinals, this claimant is placed in Cervicothoracic DRE Category II for 5% whole person impairment. For the Myofascial pain syndrome affecting the thoracic paraspinals, I place this claimant in Thoracolumbar DRE Category II for 5% whole person impairment.<sup>6</sup>

Dr. Terrance Pratt provided a court-ordered Independent Medical Evaluation (IME) of claimant on December 10, 2013. Dr. Pratt noted claimant was "only a fair historian with details but relates all of her symptoms to vocationally related activities."<sup>7</sup> Dr. Pratt reviewed claimant's available history, medical records, and performed a physical examination. He determined claimant has chronic head discomfort, history of cervicothoracic syndrome, low back pain with degenerative disk disease, history of bilateral shoulder and hand discomfort, and right knee discomfort with degenerative joint disease. Dr. Pratt provided permanent restrictions, but did not address future medical treatment.

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<sup>5</sup> See Murati Report (June 26, 2013) at 5-6.

<sup>6</sup> *Id.* at 6-7

<sup>7</sup> Pratt IME (Dec. 10, 2013) at 1.

Dr. Pratt indicated he was unable to state within a reasonable degree of medical certainty whether there was any involvement of claimant's hands and shoulders for which work was the prevailing factor due to significant inappropriate responses during the physical examination.

Using the *AMA Guides*, Dr. Pratt determined:

In relationship to [claimant's] head symptoms, it does appear that her work injury was the prevailing factor resulting in a head injury. She has residual headaches in relationship to that and reports eye symptoms which I could not confirm on the evaluation. I was not asked to specifically address cervicothoracic symptoms.<sup>8</sup>

Dr. Pratt noted claimant's head involvement was not specifically identified within the *AMA Guides*. He wrote, "I did review the pain and the central nervous system chapters. I would consider [claimant's] involvement to result in 3% permanency of the whole person."<sup>9</sup>

Dr. Pratt submitted an addendum to his December IME on June 27, 2014. Dr. Pratt was provided three tasks and asked to consider them in association with the restrictions he provided claimant in his IME. Dr. Pratt opined claimant could no longer perform 1 of the 3 tasks, resulting in a task loss of 33 percent.

#### **PRINCIPLES OF LAW**

K.S.A. 2011 Supp. 44-510e(a) states, in part:

In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

(1) Weekly compensation for temporary partial general disability shall be 66 ⅔% of the difference between the average weekly wage that the employee was earning prior to the date of injury and the amount the employee is actually earning after such injury in any type of employment. In no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c, and amendments thereto.

(2)(A) Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, and amendments thereto.

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<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.* at 6.

. . .

(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

K.S.A. 2011 Supp. 44-510h(b)(2) states, in part:

Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

K.S.A. 2011 Supp. 44-510h(e) states:

(e) It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications

### **ANALYSIS**

In its brief, respondent argues claimant failed to prove she suffered an injury arising out of and in the course of her employment. At the regular hearing, respondent, during the recitation of stipulations, admitted claimant suffered an injury by accident on the date

alleged and that the injury arose out of and in the course of her employment.<sup>10</sup> As such, respondent has waived this defense, and this issue will not be considered by the Board.

### **1. What is the nature and extent of claimant's disability?**

Claimant filed an Amended Application for Hearing on January 15, 2014, alleging injuries to her head, neck and left shoulder on or about July 27, 2011. The parties filed a formal stipulation that the reports of Drs. Murati, Baughman and Pratt could be admitted into the record without further foundation. Dr. Baughman provided no opinion relating to the head, neck and left shoulder. In his report, Dr. Baughman discussed impairment opinions relating to claimant's right shoulder, right knee and low back related to an injury occurring on or about August 15, 2012. Dr. Baughman's opinions are not relevant to this docketed claim.

Of the numerous conditions rated by Dr. Murati, the conditions that could be identified with this docketed claim include 12 percent to the left upper extremity for glenohumeral crepitus, which equals a 7 percent whole body impairment,<sup>11</sup> and 5 percent whole body impairment for myofascial pain syndrome affecting the cervical paraspinals. Utilizing the Combined Value Chart found in the *AMA Guides*, these two impairments combine for a 12 percent permanent partial impairment to the body as a whole.

Dr. Pratt did not consider the alleged cervical injury and provided no impairment opinion for claimant's alleged neck injury. Regarding claimant's left shoulder injury, Dr. Pratt wrote that the work-related injury was not the prevailing factor causing her condition. Dr. Pratt did not assess an impairment for the left shoulder. The only aspect of this accidental injury for which Dr. Pratt provided an impairment rating was the head injury. Dr. Pratt wrote that, while not specifically included in the *AMA Guides*, claimant's head injury resulted in a 3 percent whole person impairment.

Only Drs. Murati and Pratt provided impairment opinions relevant to the work-related injury giving rise to this claim. Averaging the two opinions, claimant suffers a 7.5 percent impairment to the whole person as the result of her work-related accident.

### **2. Is claimant entitled to future medical treatment?**

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<sup>10</sup> See R.H. Trans. at 4.

<sup>11</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) at 3/20, Table 3.

Dr. Baughman indicated claimant would not benefit, nor would her condition deteriorate, with future prescription medications, physical therapy or surgical intervention. However, Dr. Baughman only noted an August 15, 2012, injury in his report and had no opinion on the permanent impairment for conditions related to this docketed claim. Dr. Pratt's report did not contain an opinion related to the need for future medical care.

The only recommendation for future medical treatment was provided by Dr. Murati. Dr. Murati recommended annual follow up for claimant's neck and other medical issues not related to this docketed claim. He did not make any recommendation related to claimant's left shoulder or head. Dr. Murati's opinion is uncontroverted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.<sup>12</sup> Based upon the uncontroverted evidence, claimant is entitled to future medical treatment upon application to the Director for her neck injury only as a result of her work-related injury of July 27, 2011.

### **3. Is claimant entitled to unauthorized medical treatment?**

Claimant requested unauthorized medical, if it had not been used. No evidence of a claim for past unauthorized medical was presented at the regular hearing. K.S.A. 2011 Supp. 44-510h(b)(2) contains no time limit in which an employee is allowed to utilize unauthorized medical. As claimant met the burden of proving entitlement to future medical treatment, it logically follows she would be entitled to future unauthorized medical within the limitations of this Order.

### **CONCLUSION**

Claimant suffers a 7.5 percent impairment to the whole person as the result of her work-related accident. Claimant is entitled to medical treatment for her neck injury.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated November 13, 2014, is modified.

The claimant is entitled to 31.13 weeks of permanent partial disability compensation at the rate of \$329.63 per week, or \$10,261.38, for a 7.5 percent functional disability, making a total award of \$10,261.38. As of April 16, 2015, all amounts are due and ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

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<sup>12</sup> See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).



Dated this \_\_\_\_\_ day of April, 2015.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge